

## **STATE HOUSING APPEALS BOARD**

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### **Minutes of the October 12, 2010 Board Meeting**

**The State Housing Appeals Board (“SHAB” or the “Board”) held a public meeting on October 12, 2010 at the Warwick City Hall.**

### **ATTENDANCE**

**The following members attended the meeting: Charles Maynard, Donald Goodrich, Cynthia Fagan, Nicholas Mocerì, Theresa Santos and Chairwoman Mary Shekarchi, Esq. Also present were Steven M. Richard, legal counsel to the SHAB, Katherine Maxwell, and Karen Slavin, administrative staff to the SHAB. The Chairwoman welcomed newly appointed member Mr. Mocerì. Mr. Ostiguy was recused from the Dry Bridge matter.**

**Chairwoman Shekarchi called the meeting to order at 2:00 p.m.**

### **AGENDA ITEMS**

# **1. Dry Bridge Development v. Town of North Kingstown SHAB Appeal**

**2008-03 (oral arguments were heard at prior SHAB meetings)**

**Chairwoman Shekarchi noted that post-oral argument memoranda had been received, and that the town had filed a Motion to Exclude the Appellants memorandum. After a brief discussion the Board voted to deny the town's Motion to Quash appellant's post-oral argument memoranda.**

**SHAB deliberated issues raised by the town's denial of Dry Bridge's appeal. Chairwoman Shekarchi stated that after examining the record, she believed that certain findings in the town's decision should not be considered by SHAB since they related to local regulations adopted after Dry Bridge filed its local application. Notwithstanding those particular deficiencies, she noted that a number of the other town findings should be considered and taken together, there were sufficient findings on which to base the local decision. She noted in particular issues and certain findings around the aquifer impacts of the proposed development. Mr. Goodrich disagreed, noting the volume of detail of evidence supplied by the developer at the local board's request. He noted that most health and safety permits are issued by state agencies that have authority on those matters. SHAB members deliberated on whether the volume of the local record evidence presented by the Town to rebut the**

developer constituted simple resistance to approval or substantive questions about competing evidence. SHAB's legal counsel Steven Richard referred the members to the standards of review contained in RIGL 45-53 especially as articulated in prior Supreme Court cases.

SHAB members continued their deliberations, questioning the effect of the various waivers requested by the developer. Mr. Goodrich observed that the Town might have approved the application with various conditions or could have asked the developer to amend the application at any point during the local review, but did not.

On motion by the Chairwoman, SHAB found that the developer had submitted sufficient information to the local board to meet the requirements to issue a master plan approval. Motion passed unanimously.

SHAB members discussed whether the local board's decision was consistent with local needs and reasonable in light of the state's need for low and moderate income housing. Mr. Goodrich moved to find that the local board's decision was unreasonable. Mr. Maynard seconded. Ms. Fagan and Ms. Santos voted aye. The Chairwoman voted nay.

Regarding the consistency of the local board's decision with the local comprehensive plan, considering the local record evidence, the Chair moved to find that the proposed development was not consistent with

**the local comprehensive plan. Motion passed unanimously.**

**SHAB members considered the local decision regarding to the extent to which the Town of North Kingstown met or had planned to meet the 10% standard for low and moderate income housing, SHAB members deliberated on North Kingstown's plans to meet the 10% affordable housing standard and its progress on meeting plan standards at the time of the developer's application. Mr. Goodrich moved to find that the town did not have a valid plan in place at the time of the application. Four members voted aye. Mr. Fagan voted nay.**

**Considering the local record, SHAB members weighed the evidence on whether the local decision denying the application was made by the local board with adequate consideration of the health and safety of existing residents. The Chairwoman noted that extensive expert testimony was presented by both the town and the developer, particularly with regard to ground water impacts. The Chairwoman noted the extensive volume of evidence and the time the local board had taken considering that evidence and moved to find that in the local board had acted reasonably with regard to health and safety. Mr. Goodrich noted that there was clearly sufficient evidence to show that the local board considered health and safety in their review and findings. Motion passed unanimously.**

**SHAB examined the consistency of the local decision denying the**

developer's application with the need for environmental protection. Mr. Goodrich stated he believed that the developers presented adequate evidence showing the consideration of environmental protection but the town's experts provided evidence that was sometimes in conflict with what the developer presented. He stated that the authority to make decisions on environmental protection belonged to the various state agencies that issue the relevant permits. He further noted that he found nothing in the local record to indicate that questions that arose could not be addressed by the state agencies authorized to grant environmental protection permits. Mr. Goodrich moved to find that the town's denial was unreasonable in consideration of environmental protection issues. Ms. Santos seconded. Mr. Maynard voted aye, Ms. Fagan and the Chairwoman voted nay.

Continuing its deliberations, the SHAB considered whether the evidence indicated that the town considered the application differently because it included subsidized housing. The Chairwoman stated her opinion that the record showed no bias against the development related to its inclusion of subsidized units. Mr. Goodrich disagreed. He noted that the town has never offered an alternative plan, or indicated that they would approve a project with modifications that deemed appropriate. He argues that it is the norm for local boards to negotiate many project features with developers. He believed the fact that no alternatives to the agreed 286 unit plan were discussed was evidence that the local board treated the

application differently than they would have if it were an application that did not contain subsidized units. Mr. Goodrich moved to find that the town did not apply its zoning and special exception procedures evenly. Mr. Maynard seconded. Ms. Santos voted aye. Ms. Fagan and the Chairwoman voted nay.

The Chair confirmed that the SHAB members had no other issue or consideration regarding the records. Hearing none she moved to find town's decision denying the application, based on her conclusions, was reasonable and consistent with local needs. Mr. Goodrich, Mr. Maynard and Ms. Santos voted nay. Ms. Fagan and the Chairwoman voted aye.

Noting a Supreme Court precedent regarding "Union Village" a previous appeal of a SHAB decision, Mr. Richard explained that the appellant Dry Bridge would need a minimum of 4 votes to reverse the local decision. He concluded that the Dry Bridge appeal, in light of the Union Village decision could not be sustained. He stated he would write a decision reflecting SHAB's conclusions reflecting the SHAB's 3 to 2 vote.

## **2. WARM Supportive Homes, Inc. v. Town of Westerly SHAB Appeal #2010-01**

SHAB member Steve Ostiguy joined the Board for consideration of the WARM Supportive Homes v. Westerly appeal. Appearing for the

appellant, Attorney Robert Berkelhammer explained that WARM was a non profit that owned 2 buildings in Westerly. The appeal concerned Westerly's denial of its comprehensive application to create 8 affordable independent living housing units for people with disabilities. He argued that WARM's proposal was consistent with the needs stated Westerly Affordable Housing Plan. He contended further that the eight proposed units were not controversial and the only relief the project required from the local board was a variance on the number of parking spaces and a dimensional waiver to add a second story to an existing building. He emphasized that an agreement had been made with a local church to provide additional off site parking, and furthermore that on street parking was available and permitted. He contended that the addition of eight apartments would create very minimal parking impacts at the site.

SHAB members questioned Mr. Berkelhammer on how the appellant had estimated parking needs and how the provision of parking spaces related to the health and safety needs of the surrounding community. Mr. Berkelhammer responded that the developer sought to build only an existing building footprint, so the requested change in parking would not adversely affect the health and safety in a substantial detrimental way. SHAB members questioned Mr. Berkelhammer about local hearing records that seemed to indicate that community members were concerned about WARM's soup kitchen operations. Mr. Goodrich observed that the local decision reflected concerns about certain social or neighborhood problems

that were unrelated to the WARM's application to build eight units of disabled housing on the adjacent lot. Mr. Berkelhammer agreed and noted that the local waivers requested were not very significant but concerns had been raised by neighbors at the local hearings about the soup kitchen's operations.

Mr. Richard asked Mr. Berkelhammer to detail how WARM's application was consistent with the local Affordable Housing Plan. Mr. Berkelhammer noted that the issue of the applications consistency with the affordable Housing Plan was not raised at the local hearings.

Appearing for the Town of Westerly, Mr. Robert Craven argued that the local decision was a significant intensification of use adjacent to WARM's soup kitchen and services. He contended that the parking, even for WARM's current uses was inadequate and that the addition of 8 housing units would certainly increase parking needs and adversely impact the neighborhood. He maintained since the project was not specifically included in the Westerly Affordable Housing Plan, the local board was not compelled to grant the very significant parking waiver the project requested. The Board members continued to question actual parking needs that related to the application.

Mr. Berkelhammer noted that WARM had asked the local board to include all the waivers requested in the local written decision.



**At the close of oral arguments, SHAB deliberated the consistency of Westerly's denial with the local Affordable Housing Plan. Noting that there was no evidence on record that the local board deemed WARM's application inconsistent with the Plan, Chair moved to find that the local decision denying WARM's application was inconsistent with the Affordable Housing Plan. Mr. Goodrich seconded and the motion passed unanimously.**

**Noting that the record indicated that Westerly has not achieved the 10% goal, the Chairwoman moved to find that, with regard to the standard for review set out in Chapter 45-53-6 regarding meeting local needs for affordable housing, the local decision was not consistent with local needs.**

**The Board considered whether the local decision denying WARM application sufficiently considered the health and safety of existing residents. Mr. Goodrich and Mr. Ostiguy pointed out that due to the characteristics of the proposed disabled population in the units, their parking needs would likely be met by the application as it was proposed. They noted that the testimony in the local record against the development concerned parking associated with other WARM services in the adjacent lot concluding that the consideration of health and safety of existing residents would be met by the parking provided at the proposed 8 unit building. SHAB members acknowledged the important role of testimony of neighbors regarding safety and parking, but also considered the lack of expert testimony**

supporting the claims of potential safety concerns. Chairwoman Shekarchi moved to find that the local decision was not supported by the record evidence regarding health and safety. Motion passed unanimously.

Considering the standard of review regarding the need for the local decision to be consistent with needs of environmental protection, Mr. Goodrich noted there was no local record testimony indicating there was anything environmentally unsound about the project as proposed. Chairwoman Shekarchi moved to find that, in rendering its decision the town did not consider on the record any environmental protection issues. Motion passed unanimously.

The Board determined that there was no record evidence in this matter that would enable the Board to determine whether the town applied its local zoning ordinance evenly on subsidized and unsubsidized housing applications. The Chair made a confirming motion noting this issue has not been raised. Motion passed unanimously.

The Board discussed conditions it might impose if WARM's application were remanded. Upon consideration SHAB declined to impose specific conditions. The Chairwoman moved to grant master and preliminary approval to WARM's application and return the matter to the Town for necessary actions consistent with SHAB's ruling and the requirements of the Act. Motion passed unanimously.

## **Adjournment**

**The meeting adjourned at 5:40 p.m.**

**Respectfully submitted,**

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**Mary B. Shekarchi, Esq.**

**Chairperson**